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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JESUS RAMIREZ YANEZ, Defendant and Appellant.	H046431 (Monterey County Super. Ct. No. 17CR000621)

Defendant Jesus Ramirez Yanez appeals from an order denying his petition for resentencing under the Safe Neighborhoods and Schools Act (Proposition 47). (Pen. Code, § 1170.18, subd. (a).)[1] The trial court denied his petition on the ground that his felony offense did not fall within Proposition 47. Pursuant to *People v. Serrano* (2012) 211 Cal.App.4th 496 (*Serrano*), we conclude that defendant has failed to raise an arguable issue on appeal and dismiss his appeal.

On July 5, 2017, at 4:04 a.m., defendant entered the grounds of Salinas High School and used a heat gun to melt the plastic on the front of a vending machine. On August 15, 2017, defendant pleaded no contest to one count of second-degree burglary (§ 459), and admitted one prison prior (§ 1170.12, subd. (c)(1)). Pursuant to the plea agreement, the court sentenced defendant to four years in prison.

On September 10, 2018, defendant filed a petition pursuant to section 1170.18, subdivision (a) requesting that the trial court recall his felony sentence and resentence

[1] Unspecified statutory references are to the Penal Code.

him to a misdemeanor on the second-degree burglary conviction. The prosecution opposed the request. After a short hearing on October 11, 2018, the trial court denied the petition, finding defendant ineligible for relief.

Defendant subsequently filed a timely notice of appeal.

We appointed counsel to represent defendant in this court. Appointed counsel filed an opening brief pursuant to *Serrano, supra*, 211 Cal.App.4th 496, which states the case and the facts but raises no specific issues. Pursuant to *Serrano*, on March 29, 2019, we notified defendant of his right to submit written argument in his own behalf within 30 days. On April 26, 2019, we received a supplemental brief from defendant. In his supplemental brief, defendant contends that his constitutional rights were violated because he was not present at the hearing on his petition and because he had no contact with defense counsel prior to the hearing. Neither claim raises an arguable issue on appeal.

First, defendant did not have a right to be at the hearing. When a defendant files a petition to recall a sentence under Proposition 47, the trial court must first decide the defendant's eligibility for the requested relief. (§ 1170.18, subds. (a), (b), (i).) "This decision typically can be made without a hearing because eligibility is often obvious on the incontrovertible written record. [Citation.] Indeed, it is well established that a represented defendant has no constitutional or statutory right to be present to address purely legal questions or where his or her 'presence would not contribute to the fairness of the proceeding.' " (*People v. Fedalizo* (2016) 246 Cal.App.4th 98, 109.) In certain circumstances, where a factual showing may be necessary, or a factual dispute exists as to eligibility, a hearing may be necessary. Under those circumstances, courts have found that a defendant has the right to be present. (*People v. Simms* (2018) 23 Cal.App.5th 987, 998.)

In his supplemental brief, defendant suggests that because there was a factual dispute regarding his eligibility for relief, he had the right to be present at the hearing.

He contends that his second-degree burglary could have been reclassified as shoplifting under section 459.5, and that there was a factual question as to the value of the damage to the vending machine. Based on the facts of the crime, defendant did not qualify to have his second-degree burglary designated as shoplifting. Section 459.5, subdivision (a) defines shoplifting as, "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." Defendant argues that the trial court should have held a hearing to determine the value of replacing the melted plastic on the vending machine, because there was no evidence in the record that the value was over $950. Irrespective of the value of the melted plastic, defendant entered the school, where the vending machine was located, outside of school hours. The school was not open and it was not during regular business hours. Under section 459.5, any entry into a commercial establishment outside of regular business hours is burglary, not shoplifting. (§ 459.5, subd. (a).)

There was no factual dispute as to when defendant entered the school. He pleaded no contest to section 459, second-degree burglary, admitting all the facts underlying the offenses, including that he willfully and unlawfully entered the school at 4:00 a.m. with the intent to commit grand or petit larceny or any felony. (*People v. Borland* (1996) 50 Cal.App.4th 124, 127-128.) "A guilty plea is 'a judicial admission of every element of the offense charged.' " (*People v. Redd* (2014) 228 Cal.App.4th 449, 459, quoting *People v. Chadd* (1981) 28 Cal.3d 739, 748.) Having admitted facts that expressly disqualified him from a shoplifting charge, defendant could not raise a factual question about his eligibility for Proposition 47 relief. Therefore, the issue of whether defendant's section 459 conviction qualified for Proposition 47 relief was purely legal and was properly denied as a matter of law. No hearing to resolve a factual dispute was needed. (*People v. Simms*, *supra*, 23 Cal.App.5th at p. 997.) Accordingly, defendant cannot argue that he had a right to be present at the hearing. (*Id.* at p. 998.)

Second, defendant complains that his rights were violated because he was deprived of an opportunity to consult with counsel prior to the hearing. Defendant filed the petition in propria persona. The public defender agreed to appear specially on his behalf for the eligibility hearing. Nothing in the record supports defendant's contention that the public defender failed to speak with him prior to the hearing. The public defender stated on the record that the she agreed to appear on defendant's behalf, but we do not know who made that agreement or on what terms. The record is silent in this regard.

Even if the record supported defendant's claim that he was not consulted prior to the hearing, defendant cannot show that this violated his rights or prejudiced him in any way. To show ineffective assistance of counsel, defendant must show that counsel's performance was deficient, falling below an objective standard of reasonableness, and that appellant was prejudiced thereby. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.) Where defendant was ineligible for Proposition 47 relief as a matter of law, he can neither argue that counsel who appeared specially had a duty to consult with him prior to the hearing on a petition filed in propria persona, nor that he was prejudiced by the failure to do so.

As nothing in defendant's supplemental brief raises an arguable issue on appeal, we must dismiss the appeal. (*Serrano, supra,* 211 Cal.App.4th at pp. 503-504.)

DISPOSITION

The appeal is dismissed.

Premo, J.

WE CONCUR:

Greenwood, P.J.

Elia, J.

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